

3/30/01 JB
9IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL MARC,

CIVIL ACTION NO. 1:CV-00-1828

Petitioner

(Judge Caldwell)

v.

(Magistrate Judge Blewitt)

IMMIGRATION and
NATURALIZATION SERVICE,**FILED**
SCRANTON

Respondent

MAR 29 2001

PER

DEPUTY CLERK

REPORT AND RECOMMENDATION

On October 16, 2000, the Petitioner filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 seeking release. He is alleging that his prolonged detention while awaiting his deportation back to Haiti has resulted in a violation of his constitutional rights.

I. Factual Background.

The Petitioner, a native and citizen of Haiti, entered the United States as an immigrant without a visa on December 20, 1979, at Miami, Florida. (Doc. 7, Exhibit 2). On or about November 20, 1997, the Petitioner was convicted of the crime of Assault in the Second Degree, in violation of Section 120.05 of the New York State Penal Law by the County Court of the State of New York, County of Dutchess. *Id.*

This conviction was the basis for initiation of removal proceedings under Section 212(a)(7)(A)(I)(i) and Section 212(a)(2)(A)(I)(i) of the Immigration and Nationality Act, as amended. *Id.* The Petitioner was ordered removed to Haiti on December 9, 1999. (Doc. 7, Exhibit 1). The

Petitioner appealed the removal decision. The appeal was dismissed on May 31, 2000, at which time the Order became a final order.

On June 8, 2000, a formal request for a travel document was submitted by INS to the Embassy of The Republic of Haiti. (Doc. 7, Exhibit 5). The Respondent represents that the Haitian authorities have not yet responded to the request. To date, no travel documents have been obtained.

II. Discussion.

The issue with which we are presented is whether the Petitioner, who has been ordered removed from the United States, but who cannot be readily returned to his country of origin, can be detained for a prolonged period. This has been addressed by the Third Circuit in *Ngo v. Immigration and Naturalization Services*, 192 F.3d 390 (3d Cir. 1999). The *Ngo* Court held as follows:

[E]xcludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, provided that the appropriate provisions for parole are available. When detention is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable. The fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption.

Measures must be taken to assess the risk of flight and danger to the community on a current basis. The stakes are high and we emphasize that grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens.

192 F.3d at 398.

While the holding in *Ngo* was confined to excludable aliens, and the court expressed no views on the situation where deportable aliens are involved, at least two district courts in the Middle District have opined that deportable aliens are the same as excludable aliens in this context and therefore, the approach set forth in *Ngo* is equally applicable to deportable aliens. See *Michel v. Immigration and Naturalization Services*, 119 F. Supp. 2d 485, 497 (M.D. Pa. 2000); *Cuesta Martinez v. Immigration and Naturalization Services*, 97 F.Supp. 2d 647. (M.D. Pa. 2000).

The INS has enacted Interim Rules to address prolonged detention which the *Ngo* Court found to "provide reasonable assurance of fair consideration of a petitioner's application for parole pending removal." *Id.* at 399. They include, *inter alia*, "(1) written notice to the alien thirty days prior to the custody review advising that he may present information supporting a release; (2) the right to representation by counsel or other individuals; (3) the opportunity for an annual personal interview; (4) written explanations for a custody decision; (5) the opportunity for review by INS headquarters; (6) reviews every six months; [and] (7) a refusal to presume continued detention based on criminal history." *Id.*

As noted, under *Ngo*, prolonged detention is permitted, even if deportation remains only a remote possibility, as long as there are periodic reviews and the reviews establish the alien is currently a flight risk or danger to the community. The reviews must be "searching." *Ngo*, 192 F.3d at 399. Once they become "grudging and perfunctory," *Id.* at 398, due process is not satisfied.

Although unable to provide the copy of the document to the Court, the Respondent represents that at the time of the filing of the Response, November 15, 2000, the Petitioner had been issued his thirty-day notice of review of custody. On this record, we cannot say whether the

Petitioner's review was meaningful or searching. We can only assume that if there were a problem with the review, the Petitioner would have filed something with the Court. He has not done so and there is no indication that the review was not conducted as scheduled

III. Recommendation.

Based on the foregoing, it is respectfully recommended that the Petition for Writ of Habeas Corpus be denied.



THOMAS M. BLEWITT
United States Magistrate Judge

Dated: March 29, 2001

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL MARC,

Petitioner,

v.

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent

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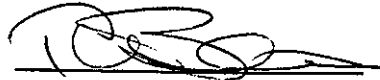
NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing
Report and Recommendation dated **March 27, 2001**.

Any party may obtain a review of the Report and Recommendation pursuant to
Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.



THOMAS M. BLEWITT
United States Magistrate Judge

Dated: March 29, 2001

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

March 30, 2001

Re: 1:00-cv-01828 Marc v. INS

True and correct copies of the attached were mailed by the clerk
to the following:

Samuel Marc
CTY-YORK
York County Prison
3401 Concord Road
York, PA 17402

Joseph J. Terz, Esq.
U.S. Attorney's Office
Room 217, Federal Building
228 Walnut St.
Harrisburg, PA 17108

cc:		
Judge	()	() Pro Se Law Clerk
Magistrate Judge	()	() INS
U.S. Marshal	()	() Jury Clerk
Probation	()	
U.S. Attorney	()	
Atty. for Deft.	()	
Defendant	()	
Warden	()	
Bureau of Prisons	()	
Ct Reporter	()	
Ctroom Deputy	()	
Orig-Security	()	
Federal Public Defender	()	
Summons Issued	()	with N/C attached to complt. and served by:
		U.S. Marshal () Pltf's Attorney ()
Standard Order 93-5	()	
Order to Show Cause	()	with Petition attached & mailed certified mail
		to: US Atty Gen () PA Atty Gen ()
		DA of County () Respondents ()
Bankruptcy Court	()	
Other	()	

MARY E. D'ANDREA, Clerk

JTB
3/30/01